No. 16-1466

# In the Supreme Court of the United States

MARK JANUS,

*Petitioner*,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, *et al.*,

*Respondents*.

*On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## BRIEF OF *AMICUS CURIAE* 1851 CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF PETITIONER


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## QUESTIONS PRESENTED

Should *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) be overruled and public sector agency fee arrangements declared unconstitutional under the First Amendment.

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## IDENTITY AND INTEREST OF *AMICUS*[1]

The 1851 Center for Constitutional Law is an Ohio non-profit corporation formed to promote and protect constitutional, human, and civil rights. The 1851 Center works to preserve freedom of political speech, recognizing that such expression is fundamental to a free society.

But in Ohio, 2,162 collective bargaining agreements, across 1,062 separate public employers, require public employees who are not union members to pay "agency fees" to unions as a condition of employment.[2] These agreements affect 312,506 Ohio public employees, forcing these Ohioans to pay annual agency fees up to $700 per year.[3] Capitalizing upon the receipt of these funds, public employee labor unions spend more on state and local Ohio political campaigns than any other "interest group" within the state.

The expropriation of these funds limits Ohioans' capacity to express their *own* message on public policy, even as Ohio law denies them the opportunity to

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

[2] Data from Ohio State Employment Relations Board clearinghouse report provided March 2017. See pages 1-96 of the report at *http://jasonahart.com/wp-content/uploads/2017/12/OH-SERB-fair-share-union-leave-super-seniority-2017-03.pdf*. See also R.C. 4117.09(C).

[3] *Id.*, at p. 9.

communicate their divergent policy views to their employer or to know the full extent of the advocacy to which their funds are applied. Meanwhile, the 1851 Center has witnessed and observed the highly ideological and objectionable political speech unions undertake through the collective bargaining process and advocacy deemed "germane" thereto.

Consequently, the 1851 Center seeks for this Court to pivot away from its prior ruling in *Abood v. Detroit Bd. of Ed.*, to the extent that it authorizes compulsion of public employees to fund unions' collective bargaining advocacy and activities germane thereto. The Constitution of the United States and the American people are served by protecting Americans from being forced to underwrite the ideological speech of a labor union as a condition of their public employment. And because resources are limited, forcing funding of one cause necessarily restricts one's capacity to speak through funding another cause. The 1851 Center maintains that this ostensible burden on *authentic* advocacy has no place in a free society.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief is dedicated to the proposition that forcing public employees who are not members of a labor union to fund union collective bargaining advocacy (through payment of agency fees to unions) is an overbroad affront to the First Amendment due to the substantial number of instances in which those funds will be used for objectionable advocacy on important public policy fronts. Pursuant thereto, this brief highlights just some of the many instances and types of instances in which unions have advanced

objectionable positions on controversial public policies irrespective of whether such advocacy is injurious to the interests of the very nonmembers that states force to fund that advocacy. Finally, this brief explains how such instances illustrate why this Court's prior decision in *Abood v. Detroit Bd. of Ed.* cannot be applied in a workable fashion. See 431 U.S. 209 (1977).

## ARGUMENT

Legislative enactments forcing public employees to subsidize unions' collective bargaining speech violate the First Amendment because that collective bargaining speech devolves into the lobbying of public officials upon highly ideological and political matters in a substantial number of applications. This understanding is derived from four principles.

*First*, "Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). In other words, an enactments that burdens political speech "cannot stand unless it is justified by a compelling state interest,'" *Id.*, at 740. But there is no compelling state interest in forcing some to fund the political speech of others. *Id.*

*Second*, just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, see *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428 (1977); *West Virginia Bd. of Ed. v. Barnette*, 319

U.S. 624, 63 S.Ct. 1178 (1943), or from compelling certain individuals to pay subsidies for speech to which they object. See *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *United States v. United Foods, Inc.*, 533 U.S. 405, 405–31 (2001). This principle is not limited to compelled subsidization of *political* speech. To the contrary, this Court is clear that one cannot be forced to subsidize *commercial* speech unaligned with his interests. *United Foods, supra* (explaining "The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts . . ."). Thus, "speech need not be characterized as political before it receives First Amendment protection," and compulsory subsidization need not be of political speech to be invalidated. *Id.*, at 413-414.

In *United Foods*, this Court rightfully invalidated a scheme forcing *all* mushroom producers to fund advertising promoting *all* mushrooms, acknowledging that "Respondent wants to convey the message that its brand of mushrooms is superior to those grown by other producers, and it objects to being charged for a contrary message which seems to be favored by a majority of producers. First Amendment values are at serious risk if the government can compel a citizen or group of citizens to subsidize speech on the side that it favors. *Id.*, at 415-417.

Simply put, when one "is required simply to support speech by others, not to utter speech itself, that

mandated support is contrary to First Amendment principles...." *Id.*

And forced subsidization of objectionable speech is not immunized from these constitutional principles simply because government creates the forum for the speech or even must approve the content of the speech. *United Foods, supra.*

*Third*, this Court acknowledges the need for especially *heightened* scrutiny, when the expressive activities one is forced to subsidize "conflict with one's freedom of belief." *Id.*

*Fourth*, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999), citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612–615 (1973); see also *United States v. Stevens*, 130 S.Ct. 1577 (2010)("In the First Amendment context, however, this Court recognizes a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep").

In *Abood*, this Court created an exception to the foregoing principles, permitting states to force public employees to fund labor union advocacy within the bounds of collective bargaining and other expression germane to collective bargaining. See 431 U.S. 209 (1977). However, this exception fails to comport with reality, in part because it fails to account for the full extent to which public sector unions' collective

bargaining advocacy is tantamount to lobbying government to make political, ideological, objectionable, and controversial changes in public policy. And it also failed to apply the type of strict scrutiny now clearly required.

Here, in states compelling the payment of agency fees to unions by public sector workers who are not members of the union, i.e. "non-right-to-work states," the payment of those fees is inherently involuntary: one simply cannot serve the public as a teacher, nurse, policeman, fireman, or sanitarian without being forced to underwrite union advocacy. And that advocacy, when undertaken within the collective bargaining process, often involves advancing objectionable positions on controversial matters of public policy. As a result, all the while forced to fund it, nonmembers are often injured by union collective bargaining advocacy in their capacities as employees, taxpayers, and Americans who are *otherwise* free to believe, develop, and advance their own views on the role of government.

In sum, (1) union collective bargaining advocacy is inherently political in a substantial number of applications (illustrated below); (2) forcing nonmembers to fund collective bargaining advocacy therefore burdens those nonmembers political speech; and (3) there is no compelling interest warranting such burdens on public employees' political speech.

## I. Collective bargaining advocacy impermissibly infringes upon the Freedom of Speech of objecting employees in a substantial number of instances.

There is no compelling interest in forcing objecting employees to pay agency fees ecause advocacy through collective bargaining often involves staking out controversial positions on the size, scope, and cost of government, thereby forcing employees to subsidize ideological advocacy in a substantial number of instances.

The statutory scope of collective bargaining, the type of advocacy undertaken by unions during collective bargaining (and "germane" activities), and union admissions regarding the political nature of collective bargaining each demonstrate that forcing nonmembers of public sector unions to fund those unions' collective bargaining advocacy results in a substantial number of impermissible affronts to those nonmembers right to be free from supporting private ideological speech. And there is no compelling governmental interest in burdening political speech with such force. In other words, forced agency fees are inherently "overbroad."

### A. The broad scope of state collective bargaining statutes necessarily invites the use of fair share fees for ideological policy advocacy rather than any compelling interest.

State statutes often define the scope of collective bargaining with impermissible breadth, thereby virtually assuring that unions will use collective

bargaining speech to advocate for the alteration of important public policies. Statutes governing the scope of collective bargaining in *amici*'s home state of Ohio illustrate this. The Ohio Revised Code provides that matters subject to collective bargaining include the following: "*All matters pertaining to* wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative . . ." R.C. 4117.08(A)(Emphasis added).

Further, unions are invited to advocate for terms within collective bargaining agreements can "(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as *the functions and programs of the public employer*, standards of services, *its overall budget*, utilization of technology, and organizational structure; (2) Direct, supervise, evaluate, or hire employees; (3) Maintain and improve *the efficiency and effectiveness of governmental operations*; (4) Determine the overall methods, process, means, or personnel by which *governmental operations* are to be conducted; (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees; (6) *Determine the adequacy of the work force*; (7) Determine the *overall mission* of the employer as a unit of government; (8) Effectively *manage the work force*; and (9) Take actions to *carry out the mission of the public employer* as a governmental unit." See R.C. 4117.08(C)(1) through (9) (Emphasis added).

Thus, compulsory agency fees can be used to fund speech advocating not just for any particular wage, hour, or term of employment, but also anything *pertaining to* wages, hours, and terms of employment. Meanwhile, compulsory agency fees can be used to fund speech advocating what *the very mission* of any unionized government agency should be, how that mission is to be carried out, how the public workforce is to be managed in the process, and how efficient and effect government will be in achieving that mission. In fact, the statutorily-prescribed scope of collective bargaining is so broad that many states like Ohio specify the finite subjects that are *not* included within the scope rather than attempting to delineate the plethora of what *is* included - - Ohio law specifies the nine and only nine subjects upon which advocacy is not permitted, which include "civil rights" and "affirmative action." See R.C. 4117.10(A)(1).

When the scope of collective bargaining is so broadly defined, it is inevitable that nonmembers' funds will be used to take controversial, debatable, and ideological positions on the very role of government, much less its size. Indeed, the instances below demonstrate that agency fees are utilized to support such politicized advocacy, and that this reality is readily acknowledged by union officials.

### B. Use of agency fees to advocate for alteration of public policy towards controversial and ideological ends is ubiquitous and fails to effectuate any compelling interest.

Whether in *amici's* home state of Ohio, in Respondent's state of Illinois, by AFSCME more generally, or elsewhere, this Court cannot ignore the well-publicized factual reality that, unions use nonmembers' compulsorily-provided agency fees to, rather than effectuate any compelling interest, lobby government for controversial ideological policy outcomes.

Many labor unions publish constitutions, handbooks, and fact sheets instructing their officials on the substantive public policies for which to advocate at the collective bargaining table - - and reasonable minds could diverge on whether unions' positions on these policies are good for the citizens of the respective locales. For example, AFSCME chronicles a "Checklist of Contract Clauses" its officials and members are to advocate for at the bargaining table: these include "union rights" such as "Access of union officials to workplace - Right to engage in union activity at work - right of stewards to conduct union business on work time - Right to post and distribute union material (bulletin boards, in-house mail service, e-mail) - Right of union to conduct or participate in employee orientation sessions - Right of elected union officials, stewards, and members to leaves of absence for union

business," as well as automatic deduction of agency fees from nonmembers' paychecks.[4]

The use of agency fees to advocate for the taxpayer-funded advancement of union and political causes is especially ubiquitous. The "Bargaining for Political Power" issue of AFSCME's "Collective Bargaining Reporter" newsletter insists that its members and officials advocate for extensive political advantage:

> In addition to language specifically tied to political action, many agreements contain clauses that provide for 'lost time' or short-term leave without pay. While generally used for more traditional union 'inhouse' activities, the time could potentially be used for lobbying or campaigning purposes. Recognizing that there is strength in numbers, AFSCME affiliates have set up specific lobbying days on which their members use lost time, or a vacation or personal day, to visit the statehouse, county board, or city council en masse. Even with the aforementioned language included in a collective bargaining agreement, it remains imperative that AFSCME members vote and actually take part in political activities in order to protect their rights and their jobs.[5]

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[4] "Checklist of Contract Clauses," AFSCME Staff portal, *http://afscmestaff.org/bargaining/contracts-and-settlements/checklist-of-contract-clauses/*. Accessed Dec. 1, 2017.

[5] Bargaining for Political Power (2000)," AFSCME Collective Bargaining Reporter newsletter, *http://web.archive.org/web/20110119210735/http://www.afscme.org/publications/9722.cfm*. Archived copy accessed Dec. 1, 2017.

Elsewhere in Illinois, the Illinois Education Association's model contract demands that union workers be freed from their duties to the public *to do union and political work without sacrificing their public salaries and benefits*:

> If requested by the Association sixty (60) days in advance of the first and/or second semester, *the President shall have the option of being released from part or all of his/her duties at no loss of salary, fringe benefits, seniority and all other contractual rights.* The President shall be considered a full-time Employee with respect to Social Security, the (Illinois Municipal Retirement Fund and FICA if association member is an ESP), the (Teachers Retirement System if association member is a certified teacher), all fringe benefits, and placement on the salary schedule. Upon return from this leave, the President shall return to the exact assignment which he/she left.[6]

In *amici's* home state of Ohio, an Ohio Civil Service Employees Association (AFSCME Local 11) "Contract Fact Sheet" bluntly advises members to advocate for the use of *seniority instead of merit* in all meaningful public employment situations: "OCSEA supports the use of seniority in selections for promotions, work assignments, order of layoff or recall, overtime and vacations because it is an objective yardstick, free from

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[6] "ESP Sample Contract Language," Illinois Education Association, page 52, *http://site.ieanea.org/region/40/assets/sampesp.pdf*. Accessed Dec. 1, 2017.

the influence of favoritism."[7] Meanwhile, Article VII, Section 12 of the Constitution of the Ohio Association for Public School Employees (AFSCME Local 4) instructs all locals to *demand the placement of fair share fees in all of their contracts*: "Collective bargaining agreements negotiated on behalf of the Union shall, where possible, contain a provision requiring that as a condition of employment . . . that the employees in the unit who are not members of the Union pay to the Union a fair share fee in an amount determined by the Executive Board."[8]

Frequently, such advocacy tends to succeed, resulting in questionable public policies and substantive terms of public employment. In 26 of the public employee union contracts on file with Ohio's State Employee Relations Board (SERB), union officers have negotiated "super seniority" benefits determining who remains employed in the event of layoffs.[9]

Additionally, "union leave," sometimes referred to as "association leave" or "release time," is a common feature of public employee union contracts. A total of

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[7] "State of Ohio Contract Series Article 16 – Seniority," Ohio Civil Service Employees Association Education Department, page 1, *https://www.ocsea.org/docs/default-source/resources/factsheets/article-16---seniority.pdf*. Accessed Dec. 1, 2017.

[8] Ohio Association of Public School Employees constitution, page 6, *http://oapse.org/wp-content/uploads/2016/11/OAPSE_constitution.pdf*. Accessed December 1, 2017.

[9] Data from Ohio State Employment Relations Board clearinghouse report provided March 2017. See page 97 of the report at *http://jasonahart.com/wp-content/uploads/2017/12/OH-SERB-fair-share-union-leave-super-seniority-2017-03.pdf*.

1,233 union contracts with 771 Ohio public employers include union leave.[10] The collective bargaining agreement between Miami University and AFSCME Ohio Council 8 that includes super seniority protection for union officers also requires the university to pay up to 10 employees for any time spent in contract negotiations,[11] and permits up to 35 days of unpaid "union leave" per year for members to attend union meetings,[12] the agreement between the Hudson Education Association and Hudson City Schools provides a bank of 24 days per school year for union members to conduct union business, with no indication that taxpayers are reimbursed for their time,[13] OAPSE's contract with Willoughby-Eastlake City Schools includes 13 days of paid leave for union

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[10] Data from Ohio State Employment Relations Board clearinghouse report provided March 2017. See pages 98-151 of the report at *http://jasonahart.com/wp-content/uploads/2017/12/OH-SERB-fair-share-union-leave-super-seniority-2017-03.pdf*.

[11] Miami University contract with AFSCME Council 8 on file with the Ohio State Employment Relations Board, page 10, *http://www.serb.ohio.gov/sections/research/WEB_CONTRACTS/16-MED-02-0179.pdf*. Accessed May 13, 2017.

[12] Miami University contract with AFSCME Council 8 on file with the Ohio State Employment Relations Board, page 43, *http://www.serb.ohio.gov/sections/research/WEB_CONTRACTS/16-MED-02-0179.pdf*. Accessed May 13, 2017.

[13] Hudson Education Association contract on file with the Ohio State Employment Relations Board, page 10, *http://www.serb.ohio.gov/sections/research/WEB_CONTRACTS/14-CON-01-2261.pdf*. Accessed May 13, 2017.

activities,[14] the three-year contract between AFSCME Ohio Council 8 and Toledo Area Metroparks gives the union 12 days of paid leave for union business,[15] Pickerington, Ohio City Schools gives Pickerington Education Association officers 15 days of paid leave per year – or 25 days in contract negotiation years – to conduct union business, and the union president can take a full year off of work.[16]

Additionally, 2015 collective bargaining advocacy by City of Los Angeles unions warrants special attention. An academic study on the collective bargaining negotiations remarked that "the fact that unions and their allies have been able to use the bargaining process to push for reforms in the City's financial relationships was by itself an immensely significant development."[17] To "gain leverage" and "put the City

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[14] Willoughby-Eastlake City Schools contract with OAPSE filed with the State Employment Relations Board, page 19, *http://www.serb.ohio.gov/sections/research/WEB_CONTRACTS/16-CON-02-1258.pdf. Accessed May 13, 2017.*

[15] Toledo Area Metroparks contract with AFSCME Ohio Council 8 filed with the State Employment Relations Board, page 10, *http://www.serb.ohio.gov/sections/research/WEB_CONTRACTS/14-MED-11-1618.pdf.* Accessed May 13, 2017.

[16] Pickerington City Schools contract with Pickerington Education Association filed with the State Employment Relations Board, pages 5 & 38, *http://www.serb.ohio.gov/sections/research/WEB_CONTRACTS/15-MED-04-0447.pdf.* Accessed May 13, 2017.

[17] Fixing Los Angeles and Remaking Public Sector Collective Bargaining: A Case Study of "Bargaining for the Common Good," by Patricia M. Dixon, PhD at Georgetown University (July 13,

on the defensive," a broad coalition of unions "insisted that non-mandated issues like revenue generation, the minimum wage, and job restoration should be subject to negotiation."[18] To be clear, SEIU Local 721 made "an increase in the minimum wage from $9 to $15" for *all* city workers a "central component" of its collective bargaining negotiations.[19]

As a result, "the 2015 collective bargaining agreement provided for the creation of an official Mayoral Commission on Revenue Generation to draft recommendations for increasing the City's income."[20] The agreement ensures that "the Coalition of L.A. City Unions" select seven of the fifteen members of the commission, which recommends the extent to which property taxes should be raised.[21] Another "major aspect of the collective bargaining agreement was a commitment on the part of the City to hire 5,000 new civilian employees by the end of the 2017-18 fiscal year."[22] The unions also successfully advocated for and achieved collective bargaining agreement terms requiring those workers to be hired "from within the community," forbidding union workers from having to

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2016), at p. 30. Available online at *http://lwp.georgetown.edu/wp-content/uploads/Fixing-Los-Angeles-and-Remaking-Public-Sector-Collective-Bargaining.pdf.*, at p. 27.

[18] *Id.*, at p. 31.

[19] *Id.*, at p. 23.

[20] *Id.*, at p. 27.

[21] *Id.*, at p. 27.

[22] *Id.*, at p. 25.

pay "out-of-pocket contributions towards healthcare premiums," and requiring Cost of Living Adjustments (COLAs) of 4.75 percent per year.[23]

Thus, unions apply nonmembers' agency fees to advocacy for, amongst other things, seniority over merit in public employment decisions, larger government and more government employees, tax increases, dramatic across-the-board increase in the minimum wages of all public and private sector employees, socialized medicine, and paid time off for some public employees to do ideological union work and even partisan political work. Forcing subsidization of such advocacy fails to serve any compelling governmental interest so as to warrant the burden on nonmembers' political speech.

Rather, just as in *United Foods,* much of this speech is inherently antagonistic towards the best interests of nonmembers. Hard-working younger public employees likely prefer merit-based systems for promotions, compensation, and layoffs. Nonmembers living in the venue likely prefer lower taxes. And nonmembers who are philosophically committed to limited government likely oppose unsustainable hiring practices and government spending, unwise minimum wage hikes, single-payer health care, and the use of tax dollars to fund their union official coworkers to do political work rather than serve the public. And most obviously, unions advocate that agency fees themselves, which nonmembers likely oppose, appear in collective bargaining agreements. Because such advocacy is political, unrelated to any compelling governmental interest, and injurious to nonmembers in a substantial

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[23] *Id.*, at p. 25.

number of its applications, forcing all public employees to fund collective bargaining advocacy is unconstitutionally overbroad.

### C. Union officials acknowledge the political and ideological orientation of their collective bargaining advocacy.

*"Politics is the union's business"*
*-AFSCME Local 36*[24]

Public sector unions readily concede that they use nonmembers' agency fees to pursue political speech through collective bargaining. AFSCME's Constitution plainly indicates "*For unions, the work place and the polling place are inseparable...,*"[25] and "[w]e have the ability to help hire and fire our bosses. These elected officials determine ... whether corporations will receive tax breaks, whether departments will be consolidated, and whether labor laws will be strengthened or weakened. They negotiate our pay raises, our pensions and our health benefits. They set health care policies that deeply affect our members as workers and consumers."[26]

Elsewhere in Illinois, the Executive Director of a coalition that includes the Chicago Teachers Union and

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[24] "AFSCME Constitution," page 7, *https://www.afscme.org/news/publications/afscme-governance/pdf/AFSCME-Constitution-2016.pdf*. Accessed Dec. 4, 2017.

[25] *Id.*

[26] "Bargaining for Political Power (2000)," AFSCME Collective Bargaining Reporter newsletter, *http://web.archive.org/web/20110119210735/http://www.afscme.org/publications/9722.cfm*. Archived copy accessed Dec. 1, 2017.

an SEIU healthcare affiliate explains: "So, legally, they may not have the right to strike over for example, *progressive revenue issues*. But by raising that demand at the bargaining table they bring the power of what's possible in the moments of contract negotiations to larger aspirations that if won *would change the entire political landscape*."[27]

An American Federation of Teachers official explained AFT's intent to "use the bargaining process to raise demands that transcend the limits of traditional collective bargaining to address systemic inequities, revenue generation, and other issues normally off limits at the bargaining table."[28] To this end, AFT's President has articulated a Wilsonian desire to "advance community needs" and a broader public good through collective bargaining: "We need a new approach that builds power through partnership with community and *leverages that power at the bargaining table to advance community needs*. Some call this bargaining for the common good—that is, bargaining that addresses both the needs of the company and/or the needs of the community."[29]

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[27] "The Long Road to Victory," Jacobin, Oct. 13, 2016, available online at *https://www.jacobinmag.com/2016/10/chicago-teachers-union-cps-rahm-emanuel-rauner-schools-strike/*. Accessed Dec. 4, 2017.2017.

[28] "Bargaining for the Common Good in Health Care," Rutgers School of Management and Labor Relations, at p. 8, available online at *https://www.aft.org/sites/default/files/ppt_barg-for-common-good.pdf*. Accessed Dec. 4, 2017.

[29] "Collective bargaining: Wage grower, quality enhancer," prepared remarks from American Federation of Teachers

In California, the president of United Teachers Los Angeles explains that "A lot of people consider teacher union contract negotiations to be about narrower issues like salaries, benefits, and work rules—and all of those are important and we deal with those—but *we're using these agreements to expand what the union goes to the table for.*"[30] Elsewhere in California, the president of SEIU Local 721 boasts that "*California unions are solidly behind single-payer health care, and property tax reform and increased school budgets.*"[31] While the Chief Negotiator for SEIU Local 721 "accepts the premise that public sector collective bargaining is *unavoidably political*, but argues that unions need to nonetheless persevere down that path," explaining "[t]he dilemma we have is that these are not mandatory negotiating points because they can walk away from the table, so what we have to do is create enough power in the community that it is not in their interest to say no to us so then we can force them to negotiate with us over restoration of jobs or training . . . we're going to raise wages . . ."[32]

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President Randi Weingarten, April 15, 2015, available online at *https://www.aft.org/press/speeches/collective-bargaining-wage-grower-quality-enhancer*, Accessed Oct. 29, 2017.

[30] "Teacher Unions Are 'Bargaining for the Common Good,'" The American Prospect, June 16, 2016, available online at *http://prospect.org/article/teacher-unions-are-%E2%80%98bargaining-common-good%E2%80%99*. Accessed Oct. 29, 2017.

[31] "Fixing Los Angeles and Remaking Public Sector Collective Bargaining," *supra.*, at p. 30.

[32] *Id.*

In Minnesota, the St. Paul Federation of Teachers president espouses a view of collective bargaining embracing social engineering policy well beyond the confines of terms of employment: "As teachers, we've always been focused on the four walls of our classroom. *But we've learned as a union that our contract is the most powerful and enforceable way we have to improve our students' learning conditions*. So for our last couple contract negotiations, we've stepped outside of traditional wages and benefits, things that are traditionally bargained for and negotiated in a contract. If there's something we can do in bargaining for the common good and we can help create more stability in our students' families' lives, we want to be able to use our contract to do that."[33]

The Montana Education Association concedes that "It's a fact of life: *every decision that affects public services is a political decision*,"[34] while the Michigan Education Association confirms that "*Every education decision is a political decision.*"[35] This language is parroted by the National Education Association state chapters in Ohio, Nevada, Iowa, Kansas, Alaska, and Wyoming. The West Virginia Education Association

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[33] "St. Paul teachers want big changes or they'll strike," Pioneer Press, Feb. 17, 2016, available online at *http://www.twincities.com/2016/02/17/st-paul-teachers-union-strike-unless-contract-public-schools/*. Accessed Oct. 29, 2017.

[34] MEA-MFT Government Relations web page, available online at *http://www.mea-mft.org/about_mea_-_mft/programs_member_services/government_relations.aspx*. Accessed Dec. 1, 2017.

[35] "The MEA Advantage," Michigan Education Association, page 17, available online at *https://mea.org/wp-content/uploads/2016/10/MEA_Advantage_Booklet.pdf*. Accessed Dec. 1, 2017.

adds an acknowledgment that "The West Virginia Education Association advocates for its members, public education employees and students through a wide variety of efforts, including political and public policy actions."[36] And the New Jersey Education Association bluntly explains that "As a school employee, you want law makers who support NJEA's efforts to Protect tenure - Protect your rights - Protect school funding."[37]

Thus, when speaking freely rather than formulating a litigation position, public sector union officials readily admit the politically-charged and controversial nature of their collective bargaining advocacy, which ranges from efforts to entirely remake society to single-payer health care and tax increases. However, such advocacy fails to effectuate any compelling government interest as it burdens nonmembers' political speech. Accordingly, forcing the payment of agency fees to subsidize collective bargaining advocacy infringes on nonmembers' First Amendment rights in a substantial number of instances and is unconstitutionally overbroad.

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[36] See West Virginia Education Association website, available online at *http://www.wvea.org/content/legislative-action-center*.

[37] See New Jersey Education Association website, available online at *https://actioncenter.njea.org/contribution/*.

## II. Compelled support of advocacy deemed sufficiently "germane to collective bargaining" impermissibly risks infringing upon the Freedom of Speech of objecting employees in a substantial number of instances.

No compelling state interest can justify forcing public employees who are not union members to fund union conventions, meetings, and publications because this expressive activity is capable of featuring advocacy no less ideological or political than collective bargaining advocacy. And there are no formal guardrails to guarantee otherwise.

This Court has previously held that objecting non-members may be compelled to subsidize publications such as the Michigan Education Association's "Teacher's Voice" magazine, reasoning that "[a]lthough they do not directly concern the members of petitioners' bargaining unit, these expenditures are for the benefit of all and we discern no additional infringement of First Amendment rights that they might occasion. In short, we agree with the Court of Appeals that these expenses are comparable to the *de minimis* social activity charges approved in *Ellis.*" *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 529 (1991), citing *Ellis v. Brotherhood of Ry. Employes*, 466 U.S. 435, 456 (1984).

However, these publications often carry highly ideological messages: communications from Ohio's public employee unions echo union leaders' tones on political candidates and campaign issues, routinely demonstrating the ties between Political Action Committee activity, union organizing, and collective bargaining. For instance, large portions of the Ohio

Education Association's *Ohio Schools* magazine - - the Ohio analog of the publication under review in *Lehnert* - - are devoted to political candidates, issue campaigns, and public policy topics including the State Teachers Retirement System (STRS), charter school regulation, voucher programs, state and federal education spending, and merit pay for teachers.[38]

In 2008 and 2012, the August, September, and October issues of the union magazine all included cover stories on the November elections. Barack Obama was featured on the covers of the October 2008 and October 2012 issues, and 2016 issues were similarly supportive of Hillary Clinton.[39]

The initial article in the April 2017 *Ohio Schools* is a letter from OEA President Becky Higgins which

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[38] See *Ohio Schools*, September 2012, page 16, archived copy available online at *http://jasonahart.com/wp-content/uploads/2017/12/ohio-schools-2012-09.pdf*; *Ohio Schools*, April 2017, pages 19-21 and back cover, archived copy available online at *http://jasonahart.com/wp-content/uploads/2017/12/oea-ohio-schools-2017-04.pdf*.; *Ohio Schools*, August 2006, archived copy available online at *http://jasonahart.com/wp-content/uploads/2017/12/ohio-schools-2006-08.pdf*.; *Ohio Schools*, August 2005, pages 2 and 23, archived copy available online at *http://jasonahart.com/wp-content/uploads/2017/12/ohio-schools-2005-08.pdf*; *Ohio Schools*, September 2012, page 4, archived copy available online at *http://jasonahart.com/wp-content/uploads/2017/12/ohio-schools-2012-09.pdf*.

[39] "Forced Dues Make Ohio Education Association a Powerful Obama Ally," Media Trackers Ohio, Oct. 17, 2012, *http://mediatrackers.org/2012/10/17/forced-dues-make-ohio-education-association-a-powerful-obama-ally/*. Accessed Dec. 4, 2017; *Ohio Schools*, October 2016, archived copy available online at *http://jasonhart.com/wp-content/uploads/2017/12/oea-ohio-schools-2016-09.pdf*.

begins "President Donald Trump and Secretary of Education Betsy DeVos do not share our priorities."[40] In the same letter, Higgins bemoans proposed federal spending cuts and praises OEA members for their political lobbying.[41] The magazine's second feature is a column endorsing state changes to high school graduation requirements, the third feature is a full-page comic strip criticizing DeVos, and later in the same issue are two pages of legislative updates, a full page "Political Action" feature celebrating OEA Lobby Day, and a two-page endorsement of a "State Teachers Retirement System" board member seeking re-election.[42]

Thus, union publications are free to, and invariably do, address highly ideological matters and advocate certain viewpoints on important public policies - - not just in election issues, but on a regular basis. As such, forcing objecting nonmembers to subsidize these publications through the forced transfer of agency fees is impermissibly overbroad.

Similarly, this Court has previously concluded that objecting public workers may be forced to subsidize union meetings and conventions. See *Lehnert, supra.*, at 530, citing *Ellis, supra.*, at 448-449. Here again, however, nothing stops such meetings and conventions from devolving into political and ideological strategy sessions. As just one prominent example, the Ohio

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[40] Ohio Schools, April 2017, page 2, archived copy available online at *http://jasonahart.com/wp-content/uploads/2017/12/oea-ohio-schools-2017-04.pdf.*

[41] *Id.*

[42] *Id.*

Education Association's 2014 Collective Bargaining Conference prominently featured two "Exposing Our Enemies" sessions, listing "the Koch brothers, Students First, American Legislative Exchange Council (ALEC), Tea Party Patriots, the 1851 Center for Constitutional Law and the Ohio School Board Leadership Council" as "enemies" in its agenda.[43]

The convention's 2016 Agenda explained "More than ever, member engagement at the local level is important to protecting members' contracts, providing programs and services for all students, and protecting public education from additional funding cuts," while the convention taught members "how their local association can take an active role" in recruiting school board candidates, running levy campaigns, and lobbying school board, General Assembly, and State Board of Education members.[44] Three of the six topics listed for the Ohio Educations' 2017 Summer Academy, are "Organizing," "Social Justice," and "Government Relations & Communications."[45]

Consequently, activities "germane to collective bargaining" such as meetings, conventions, and publications are entirely susceptible to devolving into political advocacy, and there are no safeguards to

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[43] "Ohio Teachers Union Opens Yearly Conference With Communist Ballad," Media Trackers Ohio, *http://mediatrackers.org/ohio/2014/02/17/teachers-union-conference-communist-ballad*, accessed May 13, 2017.

[44] OEA Summer Academy 2016 Agenda, *https://www.regonline.com/builder/site/tab2.aspx?EventID=1835018*. Accessed May 13, 2017.

[45] OEA Summer Academy 2017 Summary, *https://www.regonline.com/builder/site/Default.aspx?EventID=1932099*. Accessed May 13, 2017.

prevent this devolution. As such, forcing payment of agency fees to fund these communicative activities burdens nonmembers' political speech without serving any compelling state interest, and therefore violates the First Amendment rights of nonmembers.

## III. *Abood* must be overturned because differentiating advocacy germane to collective bargaining from lobbying, litigation, and politics has proven unworkable.

The analysis above demonstrates that (1) agency fees force nonmembers to fund objectionable public policy advocacy in a substantial number of circumstances where collective bargaining advocacy takes place; (2) the objectionable advocacy fails to advance any compelling state interest warranting the burden on nonmembers' political speech in those circumstances; (3) the collective bargaining advocacy can often be injurious to nonmembers' own interests; and therefore (4) forcing the payment of agency fees is an overbroad burden on political speech of objecting employees and therefore facially unconstitutional pursuant to the First Amendment. Accordingly, this Court should invalidate state mandates that public sector workers who are not union member pay agency fees to underwrite union collective bargaining advocacy. And this Court should do so even if doing so conflicts *Abood*, since - - as the instances chronicled above aptly demonstrate - - *Abood* has proven arbitrary, inconsistent, and unworkable.

This Court overturns poorly-reasoned applications of the United States Constitution when that application has proven unworkable. See *Citizens*

*United v. FEC*, 558 U.S. 310, 362-365 (2010). Here, the "unworkable" test flowing from *Abood* is articulated most poignantly in this Court's decision in *Lehnert*:

> [A]lthough the Court's decisions in this area prescribe a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees . . . chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

*Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 507–64 (1991). This test, facilitating forced subsidization of union advocacy when that advocacy takes place through collective bargaining activity and activity "germane" thereto, is unworkable.

*First*, *Lehnert* illustrates the nebulousness of any test attempting to draw lines between that expressive activity which a nonmember may be forced to subsidize and that which he may not. In essence, this Court concluded that public employees who are not union members may be forced to subsidize union collective bargaining advocacy, conventions, meetings, and publications, but not union lobbying and litigation. *Lehnert, supra.*, at Syllabus. However, there is no practical means of enforcing this test other than for a federal court to perform a line-by-line analysis of each and every demand at the bargaining table, each and every article in a magazine, and each and every official word spoken at a meeting or convention. Doing so is

impossible as a matter of law because unions often advocate *in secret and behind closed doors*, such that the full extent of their demands is never known. See R.C. 4117.21 ("Collective bargaining meetings between public employers and employee organizations are private, and not subject to [Ohio open meetings laws]").

Further, line by line and word by word analyses are highly impractical. Indeed, in *Lehnert*, this Court appeared to eventually give up on such analysis, resorting to sweeping generalizations and speculation about union meetings, publications, and collective bargaining to draw lines: the *Abood* framework forced the Majority in *Lehnert* to resort to upholding advocacy through union conventions and publications because such publications "are neither political nor public in nature, are for the benefit of all . . . [and] are likely to engender important affiliation benefits," whatever this means. See *Lehnert*, at 529-530.

*Second*, such generalizations underpinning this Court's attempt at line-drawing are frequently entirely pyrrhic, leaving the lines blurred and arbitrary. The advocacy chronicled above demonstrates that unions use collective bargaining, meetings, conventions, and publications to root out their political "enemies," support their political allies, advance minimum wage hikes and universal health insurance policies, advocate for tax increases, inflate public employee pay (for some) at taxpayer expense, reward employees for time spent on the job rather than quality and value of the services provided to the public, entrench and immunize certain employees from termination irrespective of performance, demand the hiring of th ousands of new public employees at taxpayer expense, force taxpayers

to compensate union officials to do private and political union work instead of their duties to the public, and force all public employees - - including dissenting nonmembers - - to pay a fee to the union. Such advocacy is no different than the advocacy one may pursue while lobbying state legislatures and local city councils, and far beyond what one may hope to accomplish through even the most vigorous public interest litigation agenda. Indeed, *Lehnert* disallows the use of agency fees for "a union program designed to secure funds for public education," but any collective bargaining effort raising employee pay ultimately is "designed to secure funds for public education."

Furthermore, the use of agency fees for collective bargaining advocacy is ostensibly more injurious to the dissenting public employee who is not a union member than lobbying. When a union lobbies to change policy, a dissenting nonmember is free to appear before the same public body as a coequal member of the public and provide a point of view opposing that of the union. By contrast, once a union is deemed the exclusive representative of the workplace, the dissenting employee loses the capacity to provide the employer with a viewpoint alternative to that the union is providing: unions maintain a *monopoly* in advocacy, on behalf of all public employees whether union members or not, in the collective bargaining context. As such, the substance of collective bargaining advocacy is essentially identical to that of lobbying advocacy, while the opportunity for expressive activity is artificially tilted in favor of empowering the union and gagging dissenting nonmembers.

*Third*, as the dissent of four Justices in *Lehnert* aptly points out, the "three-part test" articulated above "provides little if any guidance to parties or lower courts" and is not "administrable." *Lehnert* (Scalia, dissenting, querying, *inter alia,* "what is 'germane?'"), at 551. This is an entirely meritorious critique of the Majority's opinion. However, *Majority's* critique of the *dissenting* Justices' profession solution, i.e. permitting agency fees only for use "in performance of the union's statutory duties," was *equally compelling* in its merit: the Majority aptly observes that such as test "turns our constitutional doctrine on its head," as "instead of interpreting statutes in light of our First Amendment principles, he would interpret the First Amendment in light of state statutory law . . . A rule making violations of freedom of speech dependent upon the terms of state employment statutes would sacrifice sound constitutional analysis for the appearance of administrability." *Lehnert*, at 526-527. Thus the *Lehnert* Majority's proposed test for when public employees may be compelled to subsidize union advocacy is vague and arbitrary and requires speculation and generalization, while the *Lehnert* Dissent's proposed test "turns constitutional doctrine on its head."

The fact that none of the nine Justices were able to actually *apply* the *Abood* framework, authorizing agency fees for collective bargaining and activities germane thereto, strongly suggests that *Abood* is unworkable and must be replaced with a bright-line test. And because, as chronicled above, all union expressive activity is invariably rife with objectionable political and ideological advocacy, the only bright-line test that will suffice is one forbidding state

governments from charging agency fees to public employees.

## CONCLUSION

Just as no public employee may be forced to fund a political party as a condition of employment, no public employee should be forced to fund objectionable union advocacy on important public policies as a condition of employment. Forcing the payment of agency fees to unions results in forced funding of objectionable public policy advocacy in a substantial number of circumstances. Doing so burdens dissenting employees' political speech, often causing them actual injury, while failing to advance any compelling state interest. And doing so is facially unconstitutional pursuant to the First Amendment due to the overbroad nature of the advocacy public employees are forced to fund. Accordingly, this Court should invalidate mandates requiring public sector workers who are not union members pay agency fees. And this Court should do so despite *Abood*, since - - as the instances chronicled above aptly demonstrate - - *Abood* has proven arbitrary, inconsistent, and unworkable.

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